

**STATEMENT OF DENIS R. CARON
REGARDING
RAISED BILL NO. 403 (LCO No. 2623)**

**AN ACT CONCERNING FORECLOSURE BY COMMERCIAL
POWER OF SALE**

To the honorable co-chairmen and members of the Banking Committee:

My name is Denis R. Caron and I reside in Glastonbury. I am Vice President of Commonwealth Land Title Insurance Company, a national insurer that conducts business throughout the United States. I am also Chairman of the Standards of Title Committee of the Connecticut Bar Association, as well as an emeritus member of the Executive Committee of the Real Property Section of the Connecticut Bar Association. I am also an elected member of the American College of Real Estate Lawyers, and I have authored a book, as well as several articles, on the subject of Connecticut foreclosure law. On the basis of my prior experience in matters of real property, and especially foreclosure law, I write in support of Raised Bill No. 403, for the several reason set forth below.

Raised Bill No. 403 seeks to introduce power of sale foreclosure in Connecticut. This is a non-judicial form of foreclosure, and presently exists in one form or another in more than half of the states. It is important to recognize that the Bill is extremely limited in the number of mortgages to which its provisions would apply. It does not apply to owner-occupied 1-4 family residential properties. Additionally, it only applies to mortgages in which the borrower has agreed to foreclosure by power of sale. Thus, as to all other types of property, our traditional forms of judicial foreclosure remain in effect.

Existing Connecticut foreclosure law provides safeguards for an owner in two fundamental respects: First, by affording procedural due process in connection with an opportunity to be heard; and second, by affording the owner an opportunity to redeem the property from the mortgage and thereby avoid the foreclosure. The Bill provides analogous due process rights, and even provides additional rights or benefits not available under judicial foreclosure. Procedural due process is satisfied by virtue of two separate notice requirements, the first being the notice of intention to foreclose, and the second being the notice of sale. The Bill requires a period of at least 60 days following the notice of intention to foreclosure during which the owner may cure the default. In addition, the Bill provides the owner with an opportunity to challenge the foreclosure in two distinct respects and at two different periods in the course of the proceedings: The owner can challenge the foreclosure by means of an application to court asserting claims that would ordinarily be allowable as defenses to a judicial foreclosure, such as the invalidity of the mortgage, or the absence of a default, as well as others. Additionally, even if the owner has no defense to the foreclosure *per se*, the Bill allows him to challenge the results of the sale for any improprieties in the way the sale was conducted. These rights are very much in accord with existing borrowers' rights in judicial proceedings.

Additionally, the Bill allows the borrower a significant right not currently available under existing law. Since the Bill applies only to commercial properties, most mortgages coming within its purview do not contain provisions allowing the mortgagor an opportunity to cure, *i.e.* to reinstate the mortgage by bringing it current. Since there is no such statutory right of reinstatement, it is a privilege available only to the borrower if it exists in the mortgage documents as a contractual right. Under the Bill, a lender electing to pursue foreclosure by power of sale would be required to afford the mortgagor an opportunity to reinstate during the 60-day period following the notice of intention to foreclose.

An additional feature of the Bill relates to ejectment of tenants. Residential tenants cannot have their interests terminated by virtue of a power of sale foreclosure. Thus, even though a multi-family property might fall within the scope of the Bill, all of the tenants would be protected from being ejected.

I have also critically studied this Bill from the perspective of one who is acutely interested in the marketability and insurability of real property titles. In this respect as well, the Bill contains provisions that will ensure the marketability and insurability of titles derived through such foreclosures. A number of the Bill's provisions combine to achieve this result:

First, the notice of intention to foreclose must be recorded on the land records.

Second, the Bill provides for the recording of affidavits by the person who conducts the sale, whereby a record is established showing that the procedural requirements of the Bill were satisfied in connection with a given foreclosure sale. Again, this information is crucial for a title examiner to be able to establish that the title derived through the foreclosure was properly obtained.

Third, there is a ten-day limitation period during which an owner can go to court to challenge the sale for improprieties in the manner in which it was conducted. If such a challenge is made, the person challenging the sale must record a notice of *lis pendens* on the land records within the ten-day challenge period. Thus, a title examiner can establish, as a matter of record, that there is no outstanding challenge to the foreclosure.

You should note that non-judicial foreclosure already exists in Connecticut in two respects: First, federal law preempts state law on the foreclosure of mortgages held by HUD, on both multi-family and single-family properties. That federal law is largely devoid of the substantive and procedural safeguards found in the Bill before you, since notice requirements are minimal. Second, the tax collector sale statutes, Conn. Gen. Stats. §§12-157 *et seq.*, which the legislature significantly revised in 1995, are the functional equivalent of a non-judicial tax lien foreclosure.

The Bill as presently drafted does contain some inconsistencies and lacks some necessary provisions that I have not mentioned, but none of these matters present substantive issues, and can easily be resolved prior enactment of a final version.

In summary, I believe that Raised Bill No. 403 presents an opportunity for this Committee and the legislature to enact a provision that will be of considerable benefit to a number of interested groups:

- It will assist the lending community, by enabling the foreclosure of commercial properties to proceed on an expeditious basis.
- Our judicial system also benefits, in that a significant volume of time-consuming litigation is likely to be removed from the court dockets.
- The borrower benefits, in that his rights continue to be as protected as they currently are in judicial foreclosure, and he also obtains a significant benefit with the right of reinstatement.
- The community benefits, in that many of the properties anticipated to come within the purview of this new provision are blighted, and power of sale foreclosure enables a lender to quickly take control of the property and minimize the level of blight, if not eliminate it altogether by finding a buyer who can rehabilitate it and return it to productive use.
- Finally, the Bill establishes a mechanism whereby land titles derived through such foreclosures would be capable of being insured through title insurance companies.

For all of these reasons, I urge your favorable consideration of this legislation.